

The South China Sea Arbitration Case Filed by the Philippines against China: Arguments concerning Low Tide Elevations, Rocks, and Islands

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Abstract: On March 30, 2014, the Philippines submitted its Memorial to the Arbitral Tribunal, which presents the country's case on the jurisdiction of the Tribunal and the merits of its claims. In the Memorial, the Philippines argues that Mischief Reef, Second Thomas Shoal, Subi Reef, Gaven Reef, McKennan Reef, Hughes Reef are low-tide elevations, and that Scarborough Shoal, Johnson Reef, Cuarteron Reef, and Fiery Cross Reef are "rocks", therefore these land features cannot generate entitlement to a 200-nautical-mile EEZ or continental shelf. This paper discusses if the claims made by the Philippines are well founded in fact and law. It concludes that it would be difficult for the Tribunal to rule in favor of the Philippines' claims.

Key Words: Arbitration; South China Sea; China; The Philippines; Low tide elevation; Island; Rock; UNCLOS

I. Introduction

On January 22, 2013, the Republic of the Philippines (hereinafter "the Philippines") initiated arbitral proceedings against the People's Republic of China (hereinafter "China" or "PRC") when it presented a Note Verbale¹ to the Chinese

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¹ Note Verbale from the Department of Foreign Affairs of the Republic of the Philippines to the Embassy of the People's Republic of China in Manila, No. 13-0211, 22 January 2013.

Embassy in Manila, accompanying a Notification and Statement of Claim,² in accordance with Article 287 of the 1982 United Nations Convention on the Law of the Sea (hereinafter “UNCLOS” or “the Convention”) and Annex VII to the Convention.³ The Philippines’ purpose in initiating the proceedings is to seek a solution to its disputes with China over maritime claims and entitlements in the South China Sea (hereinafter “SCS”).

In response, on February 19, 2013, China presented a Note Verbale to the Philippines rejecting and returning the Notification and Statement of Claim.⁴ Since then, despite repeated statements from Beijing, indicating that China does not accept the request, and will not participate in the arbitral proceedings, the Philippines has asked the tribunal to continue proceedings in accordance with Article 9 of Annex VII to UNCLOS, which states that “[i]f one of the parties to the dispute does not appear before the arbitral tribunal or fails to defend its case, the other party may request the tribunal to continue the proceedings and to make its award.”⁵

On March 30, 2014, the Philippines submitted its Memorial to the Arbitral Tribunal, which presents the country’s case on the jurisdiction of the Tribunal and the merits of its claims. The Memorial consists of eleven volumes. Volume I, which is 273 pages in length, contains the Philippines’ analysis of the applicable law and the relevant evidence. The main purpose of this volume is to demonstrate that the Arbitral Tribunal has jurisdiction over all of the claims made by the Philippines in its Statement of Claim, and that each of its claims is meritorious. Volumes II-X contain the documentary evidence and maps that are used in support of the claims, and collectively total approximately 3,700 pages in length. More than 40 maps are

2 Department of Foreign Affairs, the Republic of the Philippines, SFA Statement on the UNCLOS Arbitral Proceeding against China, at <https://www.dfa.gov.ph/index.php/2013-06-27-21-50-36/unclos>, 26 April 2014. The Note Verbale, Notification and Statement of Claim on West Philippines Sea are available at the same address.

3 U.N. Convention on the Law of the Sea, *U.N.T.S.*, Vol. 1833, p. 397, adopted in Montego Bay, Jamaica, on 10 December 1982, entry into force on 16 November 1994. For the status of the treaty, visit the website of the United Nations, at https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI~6&chapter=21&Temp=mtdsg3&lang=en, 4 April 2014; the English text of the treaty, at <https://treaties.un.org/doc/Publication/UNTS/Volume%201833/volume-1833-A-31363-English.pdf>, 4 April 2014.

4 Note Verbale from the Embassy of the People’s Republic of China in Manila to the Department of Foreign Affairs of the Republic of the Philippines, No. (13) PG-039, 19 February 2013, p. 1.

5 U.N. Convention on the Law of the Sea, *U.N.T.S.*, Vol. 1833, p. 397.

included in these volumes. Volume XI contains legal authority.⁶

In the Memorial, the Philippines argues, *inter alia*, that Mischief Reef (English)/Meiji Jiao (Chinese)/Panganiban Reef (Philippines), Second Thomas Shoal/Ren'ai Jiao/Ayungin Shoal, Subi Reef/Zhubi Jiao/Zamora Reef, Gaven Reef/Nanxun Jiao/Burgos, McKennan Reef/Ximen Jiao/Chigua Reef, and Hughes Reef/Dongmen Jiao are low-tide elevations (hereinafter "LTE") and therefore cannot generate entitlement to a 12-nautical-mile territorial sea, 200-nautical-mile exclusive economic zone (EEZ) or continental shelf. In addition, these six LTEs are not capable of appropriation by occupation. Moreover, it is argued that Mischief Reef and Second Thomas Shoal are part of the Philippines' EEZ and continental shelf. In addition to these six LTEs, the Philippines also argues in the Memorial that Scarborough Shoal/Huangyan Dao/Bajo de Masinlocor Panatag Shoal, Johnson Reef/Chigua Jiao/Mabini Reef, Cuarteron Reef/Huayang Jiao/Calderon Reef, and Fiery Cross Reef/Yongshu Jiao/Kagitingan Reef are "rocks" and therefore cannot generate entitlement to an EEZ or continental shelf. In order to support its claims, the Philippines takes the position that Itu Aba/Taiping Dao/Ligao, Thitu Island/Zhongye Dao/Pagasa, and West York/Xiyue Dao/Likas are "rocks" within the meaning of Article 121, Paragraph 3, of UNCLOS and therefore are not entitled either an EEZ or continental shelf.

Based on the arguments made in the Memorial, the Philippines requests the Arbitral Tribunal to adjudge and declare the following:

1. Mischief Reef, Second Thomas Shoal and Subi Reef are low-tide elevations

6 See Department of Foreign Affairs, Republic of Philippines, Statement of Secretary Albert F. del Rosario on the Submission of the Philippines' Memorial to the Arbitral Tribunal, at <https://www.dfa.gov.ph/index.php/2013-06-27-21-50-36/dfa-releases/2460-statement-of-secretary-albert-f-del-rosario-on-the-submission-of-the-philippines-memorial-to-the-arbitral-tribunal>, 4 April 2014. Vol. II (Figures, Nautical Charts and Maps), Vol. III (Exhibits: Arbitral Documents, Philippine Government Documents), Vol. IV (Philippine Government Documents), Vol. V (Chinese Government Documents and ASEAN Documents), Vol. VI (Third-Party Government Documents and Laws; Diplomatic Exchanges), Vol. VII (Communications between States and the Commission on the Limits of the Continental Shelf; Geographical Materials; Expert Reports and Written Affidavits; Academic Articles, Book Excerpts and Reports), Vol. VIII (Academic Articles, Book Excerpts and Reports), Vol. IX (Academic Articles, Book Excerpts and Reports), Vol. X (Academic Articles, Book Excerpts and Reports; Newspaper Reports; Miscellaneous), and Vol. XI (Legal Authorities: ICJ Cases and Advisory Opinions; ITLOS Cases; Other International Case Law; PCIJ Cases and Advisory Opinions; UN Documents; Treaties; Law of the Sea Negotiating History Documents; Treaties and Articles; Other International Legal Materials).

(“LTE”) that do not generate entitlement to a territorial sea, EEZ or continental shelf, and are not features that are capable of appropriation by occupation or otherwise;

2. Mischief Reef and Second Thomas Shoal are part of the EEZ and continental shelf of the Philippines;

3. Gaven Reef and McKennan Reef (including Hughes Reef) are LTEs that do not generate entitlement to a territorial sea, EEZ or continental shelf, but their low-water line may be used to determine the baselines from which the breadth of territorial sea of Namyit/Hongxiu Dao and Sin Cowe/Jinghong Dao, respectively, is measured;

4. Johnson Reef, Cuarteron Reef and Fiery Cross Reef generate no entitlement to an EEZ or continental shelf;

5. China’s occupation of and construction activities on Mischief Reef

(a) violate the provisions of UNCLOS concerning artificial islands, installations and structures;

(b) violate China’s duties to protect and preserve the marine environment under the Convention; and

(c) constitute unlawful acts of attempted appropriation in violation of the Convention.⁷

It is argued that since all of the above-mentioned features are located within the claimed EEZ and continental shelf that are generated from Itu Aba, Thitu Island, or West York Island, the three largest land features of the Spratly archipelago in the SCS, in accordance with Articles 5, 56, 57, 76, 77 and 121, it is difficult for the Philippines’ claims to be accepted by the Tribunal. According to Article 9 of Annex VII to the Convention, “[b]efore making its award, the arbitral tribunal must satisfy itself not only that it has jurisdiction over the dispute but also that the claim is well founded in fact and law.”⁸ It is therefore argued that some, if not all, of the claims made by the Philippines are not well founded in fact and law.

The purpose of this paper is to discuss whether or not the claims made by the Philippines with regard to Scarborough Shoal and the 13 features of the Spratly archipelago, namely, Mischief Reef, Second Thomas Shoal, Subi Reef, Gaven

7 Arbitration under Annex VII of the United Nations Convention on the Law of the Sea, Republic of the Philippines v. People’s Republic of China, Memorial of the Philippines, Volume 1, 30 March 2014, pp. 271~272. [hereinafter “Memorial of the Philippines”]

8 U.N. Convention on the Law of the Sea, *U.N.T.S.*, Vol. 1833, p. 397.

Reef, McKennan Reef, Hughes Reef, Johnson Reef, Cuarteron Reef, Fiery Cross Reef, Itu Aba, Thitu Island, Sin Cowe Island and West York Island, are well founded in fact and law. The main applicable provisions contained in the UNCLOS are Articles 13, 56, 57, 60, 74, 76, 83, and 121.

This paper consists of nine parts, including this introduction. Part II provides background on the case filed by the Philippines in January 2013. Part III addresses the commencement of arbitration proceedings. Part IV describes the Chinese response to the Philippines' request for arbitration. This is followed by a brief description of geographical facts concerning the 12 features that are specified in the Philippines' Memorial in Part V. Part VI discusses the Philippines' claims and arguments relating to the legal status and rights of LTEs, rocks, or islands under international law, in particular UNCLOS. Part VII examines law applicable to the claims and arguments made by the Philippines in its Memorial. Part VIII explains why the Tribunal should rule that the Philippines' claims are not well founded in fact and law and therefore should be rejected. Finally, in Part IX, this paper ends with brief concluding remarks.

II. Case Background

On May 6, 2009, Malaysia and the Socialist Republic of Viet Nam (hereinafter "Vietnam") submitted jointly to the Commission on the Limits of the Continental Shelf (CLCS), in accordance with Article 76, Paragraph 8, of the UNCLOS, information on the limits of the continental shelf beyond 200 nautical miles (nm) from the baselines from which the breadth of the territorial sea is measured in respect of the southern part of the SCS.⁹ On the following day, Vietnam submitted independently to the CLCS information on the limits of the continental shelf beyond 200 nm from the baselines from which the breadth of the territorial sea is measured in respect of the northern part of the SCS.¹⁰ In response to these two submissions, on May 7, 2009, China submitted two Notes Verbales to the Secretary-General of the United Nations, stating, *inter alia*, that "China has indisputable sovereignty over the islands in the South China Sea and the adjacent

9 CLCS.33.3009.LOS (Continental Shelf Notification), 7 May 2009, at http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/mysvnm_clcs33_2009e.pdf, 21 May 2014.

10 CLCS.37.2009.LOS (Continental Shelf Notification), 11 May 2009, at http://www.un.org/Depts/los/clcs_new/submissions_files/vnm37_09/vnm_clcs37_2009e.pdf, 21 May 2014.

waters, and enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof.”¹¹ A map of the U-shaped line claim was attached to the two diplomatic notes (See Fig. 1).

In response to the Chinese diplomatic notes, the Philippines sent a Note Verbale to the UN Secretary-General on April 5, 2011, in which the Philippines stated that it has sovereignty and jurisdiction over the geological features in the Kalayaan Island Group (hereinafter “KIG”), which constitutes an integral part of the Philippines.¹² In addition, the Philippines stated that under the Roman notion of *dominium maris* and the international law principle of “*la terredomine la mer*” (the land dominates the sea), it exercises sovereignty and jurisdiction over “the waters around or adjacent to each relevant geological feature in the KIG” as provided for under UNCLOS. These “adjacent” waters are defined and determined under the Convention, in particularly under the regime of islands (Article 121) of UNCLOS.¹³

Moreover, the Philippines argues that since the adjacent waters of the relevant geological features in the KIG “are definite and subject to legal and technical measurement”, the Chinese claim to the “relevant waters as well as the seabed and subsoil thereof”, as reflected in the U-shaped line map attached to the two Notes Verbales sent to the UN Secretary-General on May 7, 2009, that are outside of the relevant geological features and their “adjacent waters”, has no basis under international law, specifically UNCLOS. The Philippines states that these maritime areas belong to the appropriate coastal or archipelagic State, namely, the Philippines, to which these bodies of waters, the seabed, and subsoil are appurtenant, either in the 12 nm territorial sea, or 200 nm EEZ, or continental shelf

11 Permanent Mission of the People’s Republic of China to the U.N., CML/17/2009, and CML/18/2009, United Nations, 7 May 2009, at http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2009re_mys_vnm_e.pdf and http://www.un.org/Depts/los/clcs_new/submissions_files/vnm37_09/chn_2009re_vnm.pdf, 21 May 2014.

12 Note Verbale from the Permanent Mission of the Republic of the Philippines to the United Nations to the Secretary-General of the United Nations, No. 000228, 5 April 2011, at http://www.un.org/Depts/los/clcs_new/submissions_files/vnm37_09/phl_re_chn_2011.pdf, 21 May 2014.

13 Note Verbale from the Permanent Mission of the Republic of the Philippines to the United Nations to the Secretary-General of the United Nations, No. 000228, 5 April 2011, at http://www.un.org/Depts/los/clcs_new/submissions_files/vnm37_09/phl_re_chn_2011.pdf, 21 May 2014.

in accordance with Articles 3, 4, 55, 57, and 76 of UNCLOS.¹⁴

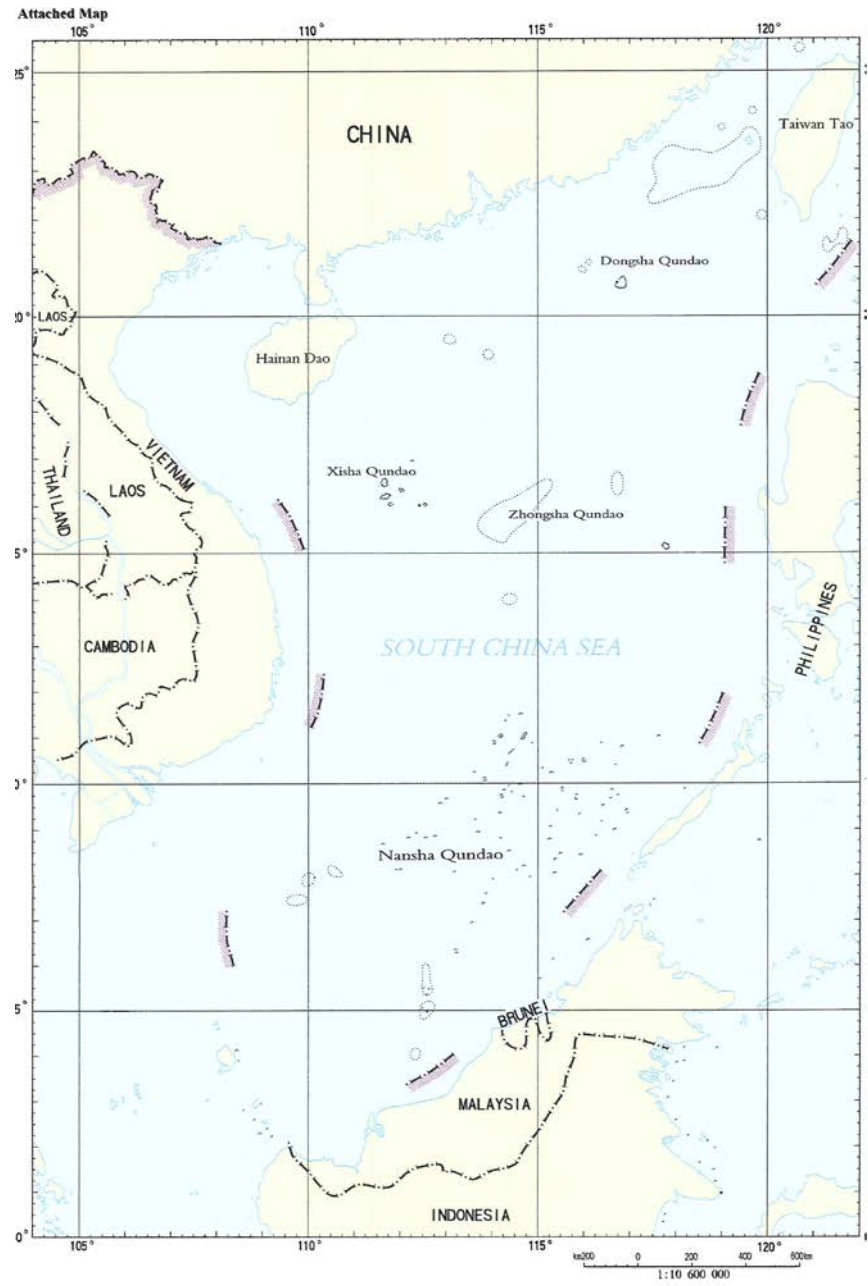


Fig. 1 China’s U-Shaped Line in the SCS

14 Note Verbale from the Permanent Mission of the Republic of the Philippines to the United Nations to the Secretary-General of the United Nations, No. 000228, 5 April 2011, at http://www.un.org/Depts/los/clcs_new/submissions_files/vnm37_09/phl_re_chn_2011.pdf, 21 May 2014.

(Source: Permanent Mission of the People's Republic of China to the U.N., CML/17/2009, and CML/18/2009, United Nations, 7 May 2009, at http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2009re_mys_vnm_e.pdf and http://www.un.org/Depts/los/clcs_new/submissions_files/vnm37_09/chn_2009re_vnm.pdf, 21 May 2014.)

On April 14, 2011, China responded to the Philippine diplomatic note by sending a Note Verbale to the U.N. Secretary-General, asserting, among other things, that:

*[U]nder the relevant provisions of the 1982 United Nations Convention on the Law of the Sea, as well as the Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone (1992) and the Law on the Exclusive Economic Zone and the Continental Shelf of the People's Republic of China (1998), China's Nansha Islands [Spratly Islands] [are] fully entitled to Territorial Sea, Exclusive Economic Zone (EEZ) and Continental Shelf.*¹⁵

In addition, China accuses the Philippines of starting to invade and occupy some islands and reefs of China's Spratly Islands and of making related territorial claims since 1970s. China considers the Philippines' acts to constitute infringement upon its territorial sovereignty. China also states that:

*[U]nder the legal doctrine of "ex injuria jus non oritur", the Republic of [the] Philippines can in no way invoke such illegal occupation to support its territorial claims. Furthermore, under the legal principle of "la terra domine la mer", coastal States' Exclusive Economic Zone (EEZ) and Continental Shelf claims shall not infringe upon the territorial sovereignty of other States.*¹⁶

One month before submitting its diplomatic note to the UN Secretary-General, China dispatched two marine surveillance vessels to the maritime areas it claims in

15 Permanent Mission of the People's Republic of China to the U.N., CML/8/2011, United Nations, 14 April 2011, at http://www.un.org/Depts/los/clcs_new/submissions_files/vnm37_09/chn_2011_re_phl_e.pdf, 21 May 2014.

16 Permanent Mission of the People's Republic of China to the U.N., CML/8/2011, United Nations, 14 April 2011, at http://www.un.org/Depts/los/clcs_new/submissions_files/vnm37_09/chn_2011_re_phl_e.pdf, 21 May 2014.

the Spratly Islands to order *MV Veritas Voyager*, a Forum Energy Plc (FEP) survey vessel operating at the Reed Bank, to leave.¹⁷ The survey ship had been chartered by FEP, a UK-based oil and gas company, which had been awarded a contract by the government of the Philippines to conduct seismic studies in the Sampaguita gas field. The Philippines lodged a protest against the Chinese action. In May and June 2011, Chinese vessels were spotted in the area near Bombay Shoal, Reed Bank and Amy Douglas Bank, reportedly unloading building materials, erecting posts, installing plastic buoys, and placing markers on these LTEs and underwater features. These are shallow waters but it was also reported that China planned to install a new advanced deep sea oil rig.¹⁸ In response to the Chinese drilling plan, Lt. Gen. Juancho Sabban, the chief of the Philippines' Western Command, asked Filipino fishermen to be ready to use their boats to block the operation of the Chinese mega oil rig.¹⁹ On 4 July 2011, the Chinese Embassy delivered a protest to the government of the Philippines after Manila invited foreign companies to bid for the right to explore oil and gas in fifteen areas northwest of Palawan, claiming that the areas fall under China's "indisputable sovereignty."²⁰

It is against this background that the Philippines began to consider the idea of submitting its dispute with China over entitlements in the SCS to adjudication in July 2011.²¹ Assumingly this idea was further floated in April 2012 when tensions in the SCS flared up after the Philippines dispatched a warship to detain fishing

17 Ian Storey, China and the Philippines: Implications of the Reed Bank Incident, *China Brief*, Vol. 11, No. 8, 6 May 2011, pp. 6~8, at http://www.jamestown.org/single/?tx_ttnews%5Btt_news%5D=37902&tx_ttnews%5BbackPid%5D=517#.U3yuT84U_3g, 21 May 2014.

18 Carlyle A. Thayer, Security Cooperation in the South China Sea: An Assessment of Recent Trends, paper presented at the First Manila Conference on the South China Sea: Toward a Region of Peace, Cooperation, and Progress, 5-6 July 2011, Dusit Thani Hotel, Makati City, the Philippines, pp. 16~17. See also Michaela P. del Callar and Mario J. Mallari, RP Government Protests China's Planned Oil Rig, Constructions in Reeds, Spratlys', *The Daily Tribune*, 2 June 2011, at <http://www.tribuneonline.org/headlines/20110602hed4.html>, 21 May 2014.

19 Andrew Higgins, In South China Sea, a Dispute over Energy, *The Washington Post*, 18 September 2011, at http://www.washingtonpost.com/world/asia-pacific/in-south-china-sea-a-dispute-over-energy/2011/09/07/gIQA0PrQaK_story.html, 21 May 2014.

20 Manila Rejects New Chinese Claim to Territory Just 50 Miles Away from Philippine Province, *The Washington Post*, 14 November 2011, at http://www.washingtonpost.com/world/asia-pacific/manila-rejects-new-chinese-claim-to-territory-just-50-miles-away-from-philippine-province/2011/11/14/gIAv3lmJN_print.html, 21 May 2014.

21 See Stefan Talmon, The South China Sea Arbitration: Is There a Case to Answer?, in Stefan Talmon and Jia Bingbing eds., *The South China Sea Arbitration: A Chinese Perspective*, Oxford: Hart Publishing, 2014, p. 71.

vessels from China in the waters near the disputed Scarborough Shoal.²² In a Note Verbale, sent by the Department of Foreign Affairs of the Philippines to the Chinese Embassy in Manila on April 26, 2012, the Philippines formally invited China to submit their dispute to the International Tribunal for the Law of the Sea (ITLOS) or another dispute settlement mechanism under UNCLOS.²³ China responded to the Philippines' invitation on the same day, stating that the Scarborough Shoal is the inherent territory of China and it is not a problem for international arbitration.²⁴ On April 27, 2012, the Chinese Foreign Ministry Spokesperson reiterated Beijing's position, adding: "Just imagine what kind of world it will be if one country can refer other countries' territory to international arbitration at will."²⁵ The next day, on April 28, 2012, the Director-General of the Department of Boundary and Ocean Affairs of the Chinese Foreign Ministry summoned the Philippine *charge d'affaires* "to lodge solemn representations on the intention of the Philippines to bring the dispute over the territorial sovereignty of Huangyan Island [Scarborough Shoal] to international arbitration."²⁶

III. Commencement of Proceedings

On January 22, 2013, the government of the Philippines invoked its rights under Section 2 of Part XV of UNCLOS to seek a resolution of the disputes with China over maritime claims and entitlements in the SCS by initiating arbitral

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- 22 Philippine Warship, Chinese Boats in Standoff Near Shoal, *Taipei Times*, 12 April 2012, at <http://www.taipeitimes.com/News/front/archives/2012/04/12/2003530121>, 21 May 2014.
 - 23 Note Verbale from the Department of Foreign Affairs of the Philippines to the Embassy of the People's Republic of China in Manila, No. 12-1137, 26 April 2012.
 - 24 Ministry of Foreign Affairs of the People's Republic of China, Foreign Ministry Spokesperson Liu Weimin's Regular Press Conference on April 26, 2012, at http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2511_665403/t928343.shtml, 21 May 2014.
 - 25 Ministry of Foreign Affairs of the People's Republic of China, Foreign Ministry Spokesperson Liu Weimin's Regular Press Conference on April 27, 2012, at http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2511_665403/t928330.shtml and Foreign Ministry Spokesperson Hong Lei's Regular Press Conference on May 8, 2012, at http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2511_665403/t930782.shtml, 21 May 2014.
 - 26 Consulate-General of the People's Republic of China in San Francisco, The MFA Department of Boundary and Ocean Affairs Lodges Representations to the Philippines on the Intention of the Philippines to Bring the Dispute over Huangyan Island Territorial Sovereignty to International Arbitration, at <http://www.chinaconsulatesf.org/eng/zgxw/t928669.htm>, 21 May 2014.

proceedings in accordance with Article 287 and Annex VII to the Convention.²⁷ A Notification and Statement of Claim was attached to a Note Verbale that was handed to the Chinese Ambassador in Manila on the same day.²⁸

In the Statement of Claim, the Philippines argues that China's U-shaped line claim is contrary to UNCLOS and thus unlawful. In addition, the Philippines states that within the maritime area encompassed by the U-shaped line, China has also laid claim to, occupied and built structures on certain submerged banks, reefs and LTEs that do not qualify as islands under UNCLOS, but are parts of the Philippine continental shelf, or the international seabed. Moreover, China has occupied certain small, uninhabitable coral projections that are barely above water at high tide, and which are "rocks" under Article 121(3) of UNCLOS. Furthermore, as argued by the Philippines, China has interfered with the lawful exercise by the Philippines of its rights within its legitimate maritime zones, as well as to the geological features and their surrounding waters. At the same time, taking note of China's Declaration made on August 25, 2006 in accordance with Articles 298 and Article 310 of UNCLOS regarding optional exceptions to the compulsory proceedings that are provided for in the Convention, the Philippines avoided raising subjects or making claims that China has, by virtue of that Declaration, excluded from arbitral proceedings, in particular those issues relating to territorial sovereignty, maritime boundary delimitation, military, and law enforcement activities.²⁹

In the Statement, the Philippines asks the Arbitral Tribunal to issue an Award that, among other thing:

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- 27 Both China and the Philippines are parties to the Convention. China ratified UNCLOS on June 7, 1996 and the Philippines on May 8, 1984. Since the two countries have not accepted the same procedure for the settlement of their disputes, under Article 287, paragraph 5, the disputes "may be submitted only to arbitration in accordance with Annex VII," unless they otherwise agree. Arbitration is one of the four procedures provided for in Article 287 for the settlement of disputes concerning the interpretation or application of the Convention. The other three procedures are: (1) the International Tribunal for the Law of the Sea established in accordance with Annex VI of the Convention; (2) the International Court of Justice; and (3) a special arbitral tribunal constituted in accordance with Annex VIII for one of more of the categories of disputes specified therein. An arbitral tribunal is constituted by the parties to the dispute in accordance with Annex VII (Arbitration) to the Convention.
- 28 Department of Foreign Affairs, the Republic of the Philippines, SFA Statement on the UNCLOS Arbitral Proceeding against China, at <https://www.dfa.gov.ph/index.php/2013-06-27-21-50-36/unclos>, 26 April 2014. The Note Verbale, Notification and Statement of Claim on West Philippine Sea are available at the same address.
- 29 Department of Foreign Affairs, the Republic of the Philippines, SFA Statement on the UNCLOS Arbitral Proceedings against China, 22 January 2013, at <https://www.dfa.gov.ph/index.php/2013-06-27-21-50-36/unclos>, 21 May 2014.

Declares that China's maritime claims in the SCS based on its so-called nine-dash line are contrary to UNCLOS and invalid;

Declares that Mischief Reef and McKennan Reef are submerged features that form part of the continental shelf of the Philippines under Part VI of the Convention, and that China's occupation of and construction activities on them violate the sovereign rights of the Philippines; and

Declares that Gaven Reef and Subi Reef are submerged features in the SCS and that are not above sea level at high tide, are not islands under the Convention, and are not located on China's Continental Shelf, and that China's occupation of and construction activities on these features are unlawful;

Declares that Scarborough Shoal, Johnson Reef, Cuarteron Reef and Fiery Cross Reef are submerged features that are below sea level at high tide, except that each has small protrusions that remain above water at high tide, which are "rocks" under Article 121(3) of the Convention and which therefore generate entitlements only to a Territorial Sea no broader than 12 nm; and that China has unlawfully claimed maritime entitlements beyond 12 nm from these features.³⁰

The Philippines also asserts that the Arbitral Tribunal has jurisdiction to hear and make an award based on its Notification and Statement of Claim because the dispute is about the interpretation and application by States Parties of their obligations under the UNCLOS. Article 287(1) of UNCLOS provides that "settlement of disputes concerning the interpretation and application of this Convention" may be referred by the Parties for resolution under Part XV of UNCLOS. The Philippines further asserts that the claim is well founded in fact and law based on the Notification and Statement of Claims and supplementary documents will be submitted in the course of the arbitral proceedings.³¹

According to Article 3(a) of Annex VII to the Convention, the arbitral tribunal should, unless the parties agree otherwise, consist of five members. In its

30 Department of Foreign Affairs, the Republic of the Philippines, Notification and Statement of Claim, pp. 17~18, para. 41, at <https://www.dfa.gov.ph/index.php/2013-06-27-21-50-36/unclos>, 26 April 2014.

31 Department of Foreign Affairs, the Republic of the Philippines, Notification and Statement of Claim, pp. 17~18, para. 41, at <https://www.dfa.gov.ph/index.php/2013-06-27-21-50-36/unclos>, 26 April 2014.

Notification and Statement of Claim, the Philippines, pursuant to Article 3(b) of Annex VII, appointed ITLOS Judge Rüdiger Wolfrum (Germany) as arbitrator on behalf of the Philippines. On March 22, 2013, acting in accordance with Article 3(c) of Annex VII, Shunji Yanai (Japan), the ITLOS President, appointed ITLOS judge Stanislaw Pawlak (Poland) as arbitrator on behalf of China. This was followed by appointment of the remaining three members of the Tribunal by President Yanai on April 23, 2013, namely, ITLOS Judge Jean-Pierre Cot (France) and Professor Alfred Soons (of the Netherlands) as arbitrators, and Ambassador Christopher Pinto (Sri Lanka) as arbitrator and President of the Tribunal. In May 2013, Ambassador Pinto withdrew from the Tribunal. As a result, President Yanai appointed former ITLOS Judge Thomas Mensah (Ghana) to replace Pinto as arbitrator and President of the Tribunal on June 21, 2013.³²

The first meeting of the Members of the Arbitral Tribunal was held on July 11, 2013 at the Peace Palace in The Hague. It was decided that the Permanent Court of Arbitration (PCA) will serve as the Registry for the arbitral proceedings. On August 27, 2013, in its first Procedural Order, the Arbitral Tribunal adopted the Rules of Procedure and fixed March 30, 2014 as the date on which the Philippines should submit its Memorial. The Tribunal instructed the Philippines to address fully all issues, including matters relating to the Tribunal's jurisdiction, the admissibility of the Philippines' claims, as well as the merits of the dispute.³³

On March 30, 2014, the Philippines submitted its Memorial to the Arbitral Tribunal. The Philippines requests that the Tribunal adjudge and declare the following:

1. China's maritime entitlements in the SCS, like those of the Philippines, may not extend beyond those permitted by UNCLOS;

2. China's claims to sovereign rights and jurisdiction and to "historic rights", with respect to the maritime areas of the SCS encompassed by the "nine-dash line" are contrary to UNCLOS and without lawful effect to the extent that they exceed the geographic and substantive limits of China's

32 For the history of the appointment, visit the website of the Permanent Court of Arbitration, at http://www.pca-cpa.org/showpage.asp?pag_id=1532, 26 April 2014.

33 PCA Press Release, Arbitration between the Republic of the Philippines and the People's Republic of China: Arbitral Tribunal Establishes Rules of Procedure and Initial Timetable, The Hague, 27 August 2013, at http://www.pca-cpa.org/shownews.asp?ac=view&pag_id=1261&nws_id=384, 27 April 2014.

maritime entitlements under the Convention;

3. Scarborough Shoal generates no entitlement to an EEZ or continental shelf;

4. Mischief Reef, Second Thomas Shoal and Subi Reef are LTEs that do not generate entitlement to a territorial sea, EEZ or continental shelf, and are not features susceptible to appropriation by occupation or otherwise;

5. Mischief Reef and Second Thomas Shoal are part of the EEZ and continental shelf of the Philippines;

6. Gaven Reef and McKennan Reef (including Hughes Reef) are LTEs that do not generate entitlement to a territorial sea, EEZ or continental shelf, but their low-water line may be used to determine the baselines from which the breadth of territorial sea of Namyt and Sin Cowe, respectively, are measured;

7. Johnson Reef, Cuarteron Reef and Fiery Cross Reef generate no entitlement to an EEZ or continental shelf;

8. China has unlawfully interfered with the enjoyment and exercise of the sovereign rights of the Philippines with respect to the living and non-living resources of its EEZ and continental shelf;

9. China has unlawfully failed to prevent its national and vessels from exploiting the living resources in the EEZ of the Philippines;

10. China has unlawfully prevented Philippine fishermen from pursuing their livelihoods by interfering with traditional fishing activities at Scarborough Shoal;

11. China has violated its obligations under UNCLOS to protect and preserve the marine environment at Scarborough Shoal and Second Thomas Shoal;

12. China's occupation of and construction activities on Mischief

(a) violate the provisions of UNCLOS concerning artificial islands, installations and structures;

(b) violate China's duties to protect and preserve the marine environment under UNLCOS; and

(c) constitute unlawful acts of attempted appropriation in violation of the Convention;

13. China has breached its obligations under UNCLOS by operating its law enforcement vessels in a dangerous manner causing serious risk of collision with Philippine vessels navigating in the vicinity of Scarborough Shoal;

14. Since the commencement of the arbitration in January 2013, China has unlawfully aggravated and extended the dispute by, among other things:

(a) interfering with the Philippines' rights of navigation in the waters at, and adjacent to, Second Thomas Shoal;

(b) preventing the rotation and resupply of Philippine personnel stationed at Second Thomas Shoal; and

(c) endangering the health and well-being of Philippine personnel stationed at Second Thomas Shoal; and

15. China shall desist from further unlawful claims and activities.³⁴

Based on the general practice of international arbitral proceedings, normally, China, as Respondent in this case, would be given an equal amount of time as the Applicant, in this case, the Philippines, about seven months, to submit a Counter-Memorial. In other words, if China changes its position and agrees to participate in the proceedings, the Tribunal could possibly set a deadline of October 2014 for China to submit its Counter-Memorial. Then, in the normal sequence of events, the two parties would have a second round of written pleadings, with the Philippines getting four or five months to submit a Reply, and China getting the same amount of time to submit a Rejoinder. However, since China has announced that it will not participate in the arbitration, it is likely that the proceedings in *The Republic of the Philippines (Applicant) v. the People's Republic of China (Respondent) Case* will go much faster than a normal arbitration case.³⁵ On June 3, 2014, the Arbitral Tribunal adopted Procedural Order No. 2, in which it set December 15, 2014 as the date for China to submit its Counter-Memorial responding to the Philippines' Memorial.³⁶

Despite of China's absence, under Article 9 of Annex VII to the Convention and Article 25 of "Rules of Procedure" in this case, the five members of the Arbitral Tribunal, including President of the Tribunal, are required to satisfy themselves that the Philippines' claims are well-grounded in fact and law. In that regard, the arbitrators have many means at their disposal to meet the requirements: (1) they

34 Memorial of the Philippines, pp. 271~272.

35 Q&A: Taking China to Court over the South China Sea, 15 October 2013, at <http://blogs.wsj.com/chinarealtime/2013/10/15/qa-the-philippines-vs-china-in-south-china-sea-claims/>, 27 April 2014.

36 Press Release, Arbitration between the Republic of the Philippines and the People's Republic of China, The Hague, 3 June 2014, at http://www.pca-cpa.org/showpage.asp?pag_id=1529, 4 June 2014.

can access publicly available maps and charts, and scholarly studies of the insular features included in the Memorial submitted by the Philippines; (2) they can hire technical experts to advise them; and (3) they can review China's laws, decrees, statements, and explanations about its maritime claims in the SCS.³⁷

IV. The Chinese Response to the Philippines' Request for Arbitration

In response to the Philippines' request for arbitration, on February 19, 2013, Chinese Ambassador to the Philippines presented a Note Verbale to the Philippine Department of Foreign Affairs, in which China returned the Notification and accompanying Statement of Claim. In addition, China made it clear that it would not accept international proceedings over the SCS dispute.³⁸ On the same day, Chinese Foreign Ministry spokesman Hong Lei stated that Manila's action had violated the consensus that was reached in the Declaration on the Conduct of Parties in the South China Sea (hereinafter "DOC"),³⁹ adding that there are factual and legal mistakes and baseless accusations against China in the statement and related notice.⁴⁰ Hong pointed out that China is committed to addressing the dispute through bilateral talks. He also mentioned the consensus that was reached by China and ASEAN member States when they signed the DOC in November 2002, that is, disputes should be solved through talks between the nations directly involved.⁴¹ In a

37 Press Release, Arbitration between the Republic of the Philippines and the People's Republic of China, The Hague, 3 June 2014, at http://www.pca-cpa.org/showpage.asp?pag_id=1529, 4 June 2014.

38 Note Verbale from the Embassy of the People's Republic of China in Manila to the Department of Foreign Affairs of the Republic of the Philippines, No. (13) PG-039, 19 February 2013, p. 1 and Pia Lee-Brago, China rejects UN arbitration on West Phl Sea, *The Philippine Star*, 20 February 2013, at <http://www.philstar.com/headlines/2013/02/20/910910/china-rejects-un-arbitration-west-phl-sea>, 28 April 2014.

39 The text of the Declaration is available in the website of ASEAN, at <http://www.asean.org/asean/external-relations/china/item/declaration-on-the-conduct-of-parties-in-the-south-china-sea>, 4 April 2014.

40 Chinese Spokesperson Hong Lei's remarks on China returned the Philippines' Notification on the submission of South China Sea issue to international Arbitration, in the website of Embassy of the People's Republic of China in the Republic of the Philippines, 19 February 2013, at <http://ph.china-embassy.org/eng/zt/nhwt/t1014903.htm>, 28 April 2014.

41 Chinese Spokesperson Hong Lei's remarks on China returned the Philippines' Notification on the submission of South China Sea issue to international Arbitration, in the website of Embassy of the People's Republic of China in the Republic of the Philippines, 19 February 2013, at <http://ph.china-embassy.org/eng/zt/nhwt/t1014903.htm>, 28 April 2014.

Note Verbale addressed to the PCA on August 1, 2013, China reiterated its position that it does not accept the arbitration filed by the Philippines and stated that it was not participating in the arbitral proceedings.⁴²

On March 30, 2014, in response to the submission of the Memorial by the Philippines to the Arbitral Tribunal, Chinese Foreign Ministry spokesman Hong Lei stated at a regular press briefing:

China has stated time and again that it does not accept the Philippines' submission of disputes with China in the South China Sea for international arbitration. This position stays unchanged. On issues concerning disputes over sovereignty of islands and reefs and delimitation of maritime boundaries, China has all along adhered to settling disputes through direct negotiations with countries concerned. This position is clearly stated in the Declaration on the Conduct of Parties in the South China Sea (DOC) jointly signed by China and ASEAN countries. It is also agreed between China and the Philippines in a series of bilateral documents. The Philippines is obliged to honor its own commitment.

No matter how the Philippine memorial is packaged, the direct cause of the dispute between China and the Philippines is the latter's illegal occupation of some of China's islands and reefs in the South China Sea. At the heart of the matter are the disputes between the two sides on the sovereignty over islands and reefs, and delimitation of maritime boundaries. Yet disputes such as these have already been excluded from arbitration procedures through a declaration made by China in 2006 pursuant to the UN Convention on the Law of the Sea (UNCLOS). In this context, China's rejection of the Philippines' submission for arbitration is solidly based on international law, and China's lawful rights as a party to UNCLOS should be truly respected.

China urges the Philippines to comprehensively and effectively implement the consensus repeatedly reaffirmed between the two sides and the DOC, and

42 PCA Press Release, Arbitration between the Republic of the Philippines and the People's Republic of China: Arbitral Tribunal Establishes Rules of Procedure and Initial Timetable, The Hague, 27 August 2013, at http://www.pca-cpa.org/shownews.asp?ac=view&pag_id=1261&nws_id=384, 27 April 2014.

*return to the right track of settling the disputes through bilateral negotiations.*⁴³

Following the submission of the Philippines' Memorial to the Tribunal, the Chinese Foreign Ministry has continuously made its position on the arbitration case clear, that is, non-acceptance and non-participation. On April 1, 2014, Hong Lei, the Chinese Foreign Ministry spokesperson, stated that China's position on non-acceptance of and non-participation in the arbitration filed by the Philippines is "clear-cut and fully supported by international law".⁴⁴ On the same day, Mr. Sun Xiangyang, *charge d'affaires a.i.* of the Chinese Embassy in Manila held a press conference and briefed the media on the Chinese position on the Philippines' submission of the Memorial. He gave the following reasons to explain why China does not accept the arbitration: (1) China is committed to resolving its disputes with the Philippines through bilateral negotiations; (2) China's refusal to accept the arbitration is an exercise of its right under international law; and (3) a resort to arbitration does not meet people's expectations for friendship in both China and the Philippines.⁴⁵

On April 3, 2014, the Chinese Embassy in Manila issued a lengthy document that reiterated the three reasons for China's non-acceptance of and non-participation in the Philippines-initiated arbitration and elaborated on China's basic position on the SCS issue. Zhang Hua, the Spokesperson of Chinese Embassy in Manila, said in the document that the Philippines' initiation of and push for international arbitration has undermined China-Philippines relations. In addition, he said, it is China's sincere wish that the disputes between China and the Philippines will be settled through bilateral negotiations. Moreover, he addressed in detail the nature of China-Philippines disputes in the SCS and the consensus reached between the two countries on the approach to deal with the SCS issue. Furthermore, he discussed the issue of Scarborough Shoal, Second Thomas Shoal, freedom and safety of

43 Remarks by Foreign Ministry Spokesperson Hong Lei on the Philippines' Submission of a Memorial to the Arbitral Tribunal in Relation to Disputes with China in the South China Sea, Foreign Affairs, 31 March 2014, at http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2535_665405/t1142356.shtml, 28 April 2014.

44 Ministry of Foreign Affairs of the People's Republic of China, Foreign Ministry Spokesperson Hong Lei's Regular Press Conference on March 31, 2014, at http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2511_665403/t1142811.shtml, 22 May 2014.

45 Embassy of the People's Republic of China in the Republic of the Philippines, Press Conference by Chinese Embassy on Philippines' Submission of a Memorial to the Arbitral Tribunal on Disputes of the South China Sea with China, 1 April 2014, at <http://ph.china-embassy.org/eng/xwfb/t1143166.htm>, 22 May 2014.

navigation, and China's commitment to make the SCS a sea of peace, friendship and cooperation.⁴⁶

On May 21, 2014, China sent a Note Verbale to the PCA, in which it reiterated China's position that it "does not accept the arbitration initiated by the Philippines" and this Note Verbale "shall not be regarded as China's acceptance of or participation in the proceedings."⁴⁷

V. Geographical Facts about the Features Mentioned in the Memorial

There are 12 geographical features mentioned in the Philippines' Memorial for the purpose of discussing the legal nature and rights of these islands, rocks, or LTEs and supporting the Philippines' arguments against China. These features are: (A) Scarborough Shoal; (B) Second Thomas Shoal; (C) Mischief Reef; (D) McKennan Reef; (E) Hughes Reef; (F) Sin Cowe Island; (G) Gaven Reef; (H) Subi Reef; (I) Johnson Reef; (J) Cuarteron Reef; (K) Fiery Cross Reef; (L) Itu Aba Island; (M) Thitu Island; (N) West York Island (see Table 1). Geographical information about these features is provided in the following pages.

*A. Scarborough Shoal*⁴⁸

This geographical feature (Huangyan Dao or Minzhu Jiao in Chinese, Scarborough Shoal or Scarborough Reef in English, and known as Panatag Shoal or Bajo de Masinloc in the Philippines) lies between Macclesfield Bank and Luzon of the Philippines. The shoal is approximately 198 km from west of Subic Bay, Philippines. The nearest landmass is Palauig, Zambales, on Luzon Islands in the Philippines, 220 km due east. It is a 55 km chain of reefs and rocks with an area of 150 km² and a lagoon.⁴⁹ All, except for six rocks, are submerged at high tide.

46 Embassy of the People's Republic of China in the Republic of the Philippines, Zhang Hua, Spokesperson, China's Position on the Territorial Disputes in the South China Sea between China and the Philippines, 3 April 2014, at <http://ph.china-embassy.org/eng/xwfb/t1143881.htm>, 22 May 2014.

47 Arbitration between the Republic of the Philippines and the People's Republic of China, Press Release, PCA, The Hague, 3 June 2014, at http://www.pca-cpa.org/showpage.asp?pag_id=1529, 13 June 2014.

48 Wikipedia, at http://en.wikipedia.org/wiki/Scarborough_Shoal, 2 June 2014.

49 The lagoon has an area of 130 km² and a depth of 15 m.

Table 1 **The Features Located in the SCS and Mentioned in the Philippines' Memorial**

	Location	Size	Distance from coast of mainland or island	Geological nature	Occupation or effective control	Jurisdictional issue
Scarborough Shoal	15°11' N 117°46' E	Total area, including an inner lagoon, is 150 km ²	325 nm from Woody Island of the Paracel Islands	Rocks or Islands? (At high tide, 6 features are above water)	China Mainland	Possible overlapping EEZ & continental shelf
2nd Thomas Shoal	09°44'00" N 115°52'00" E	Completely submerged at high tide	104 nm from Palawan and 614 nm from Hainan Island	LTE	Philippine warship <i>BRP Sierra Madre</i> sitting on the shoal since 1999	Possible overlapping EEZ & continental shelf
Mischief Reef	09°55'00" N 115°32'00" E	Total area including an inner lagoon is 46 km ²	250 km west of Palawan	LTE	China Mainland	Possible overlapping EEZ & continental shelf
McKennan Reef	09°55'00" N 114°29'00" E	Total area is 2.5 km ²	182 nm from Palawan	LTE	China Mainland	Possible overlapping EEZ & continental shelf
Gaven Reef	10°12'30" N 114°13'00" E	Total area is 2 km ²	200 nm from Palawan	LTE	China Mainland	Possible overlapping EEZ & continental shelf

Subi Reef	10°55'30" N 114°05'00" E	Total area is 16.1 km ²	232 nm from Palawan	LTE	China Mainland	Possible overlapping EEZ & continental shelf
Johnson Reef	09°42'40" N 114°16'45" E	n/a	188 nm from Palawan	LTE	China Mainland	Possible overlapping EEZ & continental shelf
Cuarteron Reef	08°51'30" N 112°50'00" E	Total area is 7.6 km ²	248 nm from Palawan	LTE	China Mainland	Possible overlapping EEZ & continental shelf
Fiery Cross Reef	09°38'00" N 112°57'00" E	Submerged at high tide, but one rock at its southwest end about the size of a table	257 nm from Palawan	LTE	China Mainland	Possible overlapping EEZ & continental shelf
Itu Aba Island	10°23'00" N 114°21'30" E	Total land area 0.49 km ²	201 nm from Palawan	Island	China Taiwan	Possible overlapping EEZ & continental shelf
Thitu Island	11°03'15" N 114°17'00" E	Total land area 0.33 km ²	480 km from Palawan	Island	Philippines	Possible overlapping EEZ & continental shelf
West York Island	11°05'30" N 115°01'30" E	Total land area 0.21 km ²	196 nm from Palawan	Island	Philippines	Possible overlapping EEZ & continental shelf

(Source: Based on the information provided for in Wikipedia and Baidu.)

In February 1999, Taiwan used the normal baseline method to draw baselines surrounding Scarborough Shoal.⁵⁰ In March 2009, the Philippines enacted An Act to Amend Certain Provisions of Republic Act No. 3046, as Amended by Republic Act of 5446, to Define the Archipelagic Baseline of the Philippines and for Other Purposes, in which, under Section 2, among others, the baseline in Scarborough Shoal should be determined according to “Regime of Islands” and as belong to the Republic of the Philippines consistent with UNCLOS.⁵¹ The Philippines and Chinese Mainland and Taiwan claim sovereignty over Scarborough. Tensions between Beijing and Manila escalated in April 2012 when the government of the Philippines dispatched a warship to detain fishing vessels from China Mainland in the waters near Scarborough Shoal.⁵² Since then, Scarborough Shoal has been under the effective control of China Mainland.

*B. Second Thomas Shoal*⁵³

Second Thomas Shoal, also known as Ayungin Shoal in the Philippines, and Ren'ai Jiao in China, is an uninhabited shoal in the Spratly group of islands in the SCS, and lies 105 nm west of Palawan, Philippines. It is completely submerged at high tide, but its eastern and western rims have drying patches at low tide. In 1999, *LT 57 Sierre Madre*, a 100 m long U.S.-built Philippine Navy ship, was deliberately run aground at the shoal for the purpose of asserting the Philippines' sovereignty claim to this LTE feature. In March 2014, tensions between China and the Philippines escalated when Chinese coast guard vessels blocked two attempts

50 The First Part of the Baselines of the Territorial Sea of Taiwan, Decree No. Tai 88 Nei Tze #06161, “Executive Yuan”, 10 February 1999, pp. 36~37, at <http://www.land.moi.gov.tw/pda/content.asp?cid=91&mcid=1284>, 2 June 2014. (in Chinese) See also LIMITS IN THE SEA No. 127, Taiwan's Maritime Claims, United States Department of State, Bureau of Oceans and International Environmental and Scientific Affairs, pp. 25~26, at <http://www.state.gov/documents/organization/57674.pdf>, 2 June 2014.

51 Republic Act No. 9522, 10 March 2009, An Act to Amend Certain Provisions of Republic Act No. 3046, as Amended by Republic Act No. 5446, to Define the Archipelagic Baseline of the Philippines and for Other Purposes, at http://www.chanrobles.com/republicacts/republicactno9522.php#.U4wcg84U_3g, 2 June 2014.

52 Philippine Warship, Chinese Boats in Standoff Near Shoal, *Taipei Times*, 12 April 2014, at <http://www.taipeitimes.com/News/front/archives/2012/04/12/2003530121>, 2 June 2014.

53 For more information, visit Wikipedia, at http://en.wikipedia.org/wiki/Second_Thomas_Shoal, 2 June 2014.

by Philippine ships to resupply the garrison.⁵⁴

*C. Mischief Reef*⁵⁵

Mischief Reef, also known as Meiji Jiao in China and Panganiban Reef in the Philippines, is a coral reef in the Spratly Islands in the SCS, located 250 kilometers west of the coast of Palawan. This feature, occupied and controlled by China Mainland, but also claimed by the Philippines and Vietnam, is a LTE. China Mainland began building structures on Mischief Reef in 1995. Since 1998, China Mainland has constructed many facilities on top of the reef, which include a number of buildings built on concrete platforms, quays, a greenhouse, various weather and telecommunications equipment.

*D. McKennan Reef*⁵⁶

This reef, known in the Philippines as Chigua Reef and in China as Ximen Jiao, lies 182 nm from the nearest point on Palawan and 567 nm from the nearest point on Hainan. McKennan Reef is seven nm from Sin Cowe Island, which is the seventh largest of islands in the Spratly archipelago. China Mainland gained effective control of this reef in 1988. According to David Hancox and Victor Prescott, McKennan Reef has an area of about 2.5 km².⁵⁷ It is located to the west of Dongmen Jiao (Hughes Reef) and considered as a LTE. In 1988, China Mainland also gained control of Hughes Reef.⁵⁸

54 China-Philippines Navy Spat Captured on Camera, *BBC News*, 30 March 2014, at <http://www.bbc.com/news/world-asia-26806924>, 2 June 2014.

55 For more information, visit Wikipedia, at http://en.wikipedia.org/wiki/Mischief_Reef, 2 June 2014.

56 For more information, visit Wikimapia, at <http://wikimapia.org/9641420/McKennan-Reef>, and <http://www.baike.com/wiki/%E8%A5%BF%E9%97%A8%E7%A4%81>, 2 June 2014. (in Chinese)

57 David Hancox and Victor Prescott, A Geographical Description of the Spratly Islands and an Account of Hydrographic Surveys Amongst Those Islands, *IBRU Maritime Briefing*, Vol. 1, No. 6, 1995, p. 11.

58 Pan Shiying, The Nansha Islands: A Chinese Point of View, *Window*, 3 September 1993, p. 29.

*E. Gaven Reef*⁵⁹

Gaven Reef, known in China as Nanxun Jiao and Burgos in the Philippines, is one of the reefs in the Tizard Bank of the Spratly Islands in the SCS. It is located 544 nm from the nearest point in China Mainland and 200 nm from the nearest point on Palawan. China Mainland gained control this feature in 1988.⁶⁰ Gaven Reef is approximately six nm from Namyit (Hongxiu Dao), the 11th largest island of the Spratly archipelago occupied by Vietnam.

*F. Subi Reef*⁶¹

Subi Reef, known in the Philippines as Zamora Reef and in China as Zhubi Jiao, is a reef in the Spratly Islands of the SCS located 232 nm from the nearest point on Palawan and 502 nm from the nearest point in China Mainland. It is about 16 miles southwest of Philippine-occupied Thitu Island. The reef dries at low-tide, but is covered by water at high tide. In 1988, China Mainland gained control of Subi Reef.⁶² It currently falls under the jurisdiction of Sansha city, Hainan province, China.

*G. Johnson Reef*⁶³

Johnson Reef, also known as Chigua Jiao in China and Mabini reef in the Philippines, is a reef in the Spratly Islands in the SCS controlled by China Mainland. It was the site of the Johnson Reef Skirmish in 1988, fought by China and Vietnam which resulted in more than 70 Vietnamese deaths, two Vietnamese boats being sunk and the Chinese conquering the reef. This reef lies 188 nm from the nearest point on Palawan and 567 nm from the nearest point on Hainan Island

59 For more information, visit Wikipedia, at http://en.wikipedia.org/wiki/Gaven_Reefs, 2 June 2014.

60 Pan Shiyang, *The Nansha Islands: A Chinese Point of View*, *Window*, 3 September 1993, p. 29.

61 For more information, visit Wikipedia, at http://en.wikipedia.org/wiki/Subi_Reef, 2 June 2014.

62 Pan Shiyang, *The Nansha Islands: A Chinese Point of View*, *Window*, 3 September 1993, p. 29.

63 For more information, visit Wikipedia, at http://en.wikipedia.org/wiki/Johnson_South_Reef, 2 June 2014.

of China. Johnson Reef is located approximately 92 nm due west of Second Thomas Shoal and 25 nm due south of Gaven Reef. The reef is submerged at high tide, but according to the U.S. gazetteer, it is visible at high tide.⁶⁴

*H. Cuarteron Reef*⁶⁵

Cuarteron Reef, known in China as Huayang Jiao and Calderon Reef in the Philippines, is a reef at the east end of the London Reefs in the Spratly Islands of the SCS. It is located 248 nm from the nearest point on Palawan and 585 nm from the nearest point on Hainan Island of China. China Mainland gained control of the reef in 1988. It has a supply platform and a reef fortress. The supply platform has anti-aircraft guns, naval guns, search radars and radio communications equipment. At least one rock is approximately 1 to 2 meters above sea level at high tide.

*I. Fiery Cross Reef*⁶⁶

Fiery Cross Reef, also known as Yongshu Jiao in China and Kagitingan Reef in the Philippines, is a group of three reefs in the Spratly Islands in the SCS. It is located approximately 40 nm due north of Cuarteron Reef and 257 nm from the nearest point on Palawan and 547 nm from Hainan Island. China Mainland gained control of the reef in 1988 when a “marine observation station” was built in accordance with a resolution adopted by the International Oceanographic Commission under UNESCO in 1987. Currently the reef has three two-story buildings and one three-story building. Two lighthouses, a helipad and a pier were also built.

64 South China Sea, Map and Gazetteer, US Government, 803425AI (G02257) 1-10, January 2010. The map and gazetteer are available online at the website of the Centre for International Law, National University of Singapore, at http://cil.nus.edu.sg/wp/wp-content/uploads/2011/06/75967_South-China-Sea-1.pdf and http://cil.nus.edu.sg/wp/wp-content/uploads/2011/06/75967_gazetteer.pdf, 2 June 2014.

65 For more information, visit Wikipedia, at http://en.wikipedia.org/wiki/Cuarteron_Reef, 2 June 2014.

66 For more information, visit Wikipedia, at http://en.wikipedia.org/wiki/Fiery_Cross_Reef, 2 June 2014.

J. Itu Aba Island (See Fig. 2) ⁶⁷

Itu Aba, known in China as Taiping Dao and Ligao in the Philippines, is the largest of the Spratly Islands in the SCS, with a total land area of 41.3 hectares. Itu Aba, disputed by Chinese Mainland and Taiwan, Vietnam, and the Philippines, is controlled by Taiwan. Administratively it is under the jurisdiction of Kaohsiung City. The distance from Taiwan to the island is about 1,600 km. There is a 1,198 meters long runway that was completed in late 2007. In February 2008, Taiwan's "president" landed on the island in an air force C-130 cargo plane to inaugurate the airstrip. At present, more than 200 "Coast Guard" personnel and a number of soldiers from Taiwan's Navy and Air Force are stationed on the island. Taiwan's Navy and "Coast Guard" send vessels regularly to the island. Cargo vessels of private shipping companies also sail to Itu Aba once or two times a month to supply



Fig. 2 Taiping (Itu Aba) Island

(Source: At <http://static.panoramio.com/photos/large/45208564.jpg>, 14 June 2014.)

67 For more information, visit Wikipedia, at http://en.wikipedia.org/wiki/Taiping_Island, 2 June 2014.

the island's daily needs. In 2007, the City Government of Kaohsiung, in accordance with Article 45 of Taiwan's Fisheries Law, promulgated the establishment of a sea turtle protected area in Itu Aba. In March 2008, then "presidential" candidate Ma Ying-jeou proposed in his ocean policy to establish a marine peace park in Itu Aba. Itu Aba is the largest island and the only island with fresh water in the Spratly archipelago, and has the capacity to sustain human habitation and economic life of its own. Accordingly, it can be established that it is an island and thus can generate a 200 nm EEZ and a continental shelf.

K. Thitu Island (See Fig. 3) ⁶⁸

Thitu Island, known as Zongye Dao in China and Pagasa in the Philippines, is the second largest island in the Spratly archipelago and is one of the nine islands occupied by the Philippines in the SCS. It covers approximately 37.2 hectares and located about 480 km west of Palawan. It has a 1.4 kilometers unpaved airstrip (named Rancudo Airstrip) which serves both military and commercial air transportation needs. The Philippine Air Force regularly sends fighter jets from



Fig. 3 Zongye (Thitu) Island

(Source: At <http://petrotimes.vn/news/vn/bien-dong/philippines-chi-112-trieu-usd-nang-cap-duong-bang-trai-phep-o-truong-sa.html>, 14 June 2014)

68 For more information, visit Wikipedia, at http://en.wikipedia.org/wiki/Thitu_Island, 2 June 2014.

Palawan to make reconnaissance missions in Philippine-controlled regions in the Spratly archipelago. The presence of the airstrip in Thitu Island makes such reconnaissance missions easier. There is also a port, called Loneliness Bay. Around 30~50 Filipino soldiers are stationed on the island, together with about 300 civilian people at its height, and nowadays about 55. The Philippine navy vessel sails to Thitu Island once a month to supply the island's daily needs. The island has 20 houses, a community center, a clinic, an eight floor watch tower, a desalination plant, several electricity generators, a weather station, and a mobile launch tower.

The island is claimed by Chinese Mainland and Taiwan Vietnam, and the Philippines. In response to the visit of Taiwan's "president" Chen Shuibian to the disputed Taiping Dao (Itu Aba) in the Spratly Islands by C-130 cargo plane in February 2008, the Philippines began to renovate Pagasa airstrip in March 2008 which was followed by the visit of Philippine Air Force Chief Lt. Gen. Pedrito Sinco Cadungog in May 2008. He and his staff conducted a visual inspection of the repairs and improvements to the Rancudo Airstrip and other minor facilities on the island. In addition, it was reported that the Philippines intended to develop Thitu Island as a tourist destination. Based on available information, it appears that Thitu Island can sustain human habitation and an economic life of its own and therefore pass the tests contained in Article 121(3) of UNCLOS. Accordingly whichever country establishes sovereignty over the island can use it as a base point from which a 200 nm EEZ and a continental shelf are claimed.

*L. West York Island (See Fig. 4)*⁶⁹

West York Island, known in the Philippines as Likas and in China Xiyue Dao, is the third largest island of the Spratly Islands chain in the SCS, with an area of 18.6 hectares. It is the second largest island among the Philippine-occupied Spratly Islands. It is located 47 miles northeast of Thitu Island. Several Filipino soldiers are stationed here. This island is also claimed by Vietnam and Chinese Mainland and Taiwan.

69 For more information, visit Wikipedia, at http://en.wikipedia.org/wiki/West_York_Island, 2 June 2014.



Fig. 4 Xiyue (West York) Island

(Source: At <http://idibon.com/geotagging-place-name-resolution-text-analysis/>, 14 June 2014)

VI. The Philippines' Arguments concerning the Features in Question

The Philippines argues in its Memorial that Itu Aba Island, Thitu Island, and West York Island do not possess natural conditions sufficient to sustain human habitation and economic life. The small human communities on Itu Aba Island and Thitu Island could not exist but for regular deliveries of the necessities of life from the outside. The presence of military and coast guard personnel, whatever the duration of their official rotation, does not amount to sustained “human habitation”. In addition, neither the military nor the civilian personnel on these two islands are engaged in activities of production, distribution or exchange in a manner that can sustain the existence and development of stable human habitation.⁷⁰ Accordingly, the Philippines argues that these three land features are “rocks” within the meaning of Article 121, Paragraph 3, of UNCLOS and therefore are not entitled either an

70 Memorial of the Philippines, pp. 145~146.

EEZ or continental shelf.

The Philippines also argues that the six coral features located in Scarborough Shoal that are above water at high tide are too small in size to sustain human habitation, and are completely barren. They are devoid of fresh water, soil, flora and fauna and therefore not habitable. They provide none of the elements necessary for economic life. Accordingly, the Philippines argues that these features “are indisputably ‘rocks’ within the meaning of Article 121(3) and, as such, they do not generate entitlements to an EEZ or a continental shelf.”⁷¹

The Philippines also argues that Second Thomas Shoal, Mischief Reef, McKennan Reef, Gaven Reef and Subi Reef are LTEs. China has constructed facilities on each of these features except Second Thomas Shoal. All of these five features except McKennan Reef and Gaven Reef are located more than 12 nm from any other feature of the Spratly archipelago that is above water at high tide. Accordingly, the Philippines’ claims that Second Thomas Shoal, Mischief Reef and Subi Reef do not generate entitlements to a territorial sea, an EEZ or a continental shelf. In addition, these three features are not capable of appropriation, either by occupation or otherwise. Depending on location, these three features either form part of the continental shelf of the coastal State in whose continental shelf they lie, or part of the seabed beyond national jurisdiction.⁷² As far as McKennan Reef and Gaven Reef are concerned, the Philippines takes the position that they are subject to appropriation by whichever State is ultimately determined to have sovereignty over the features, and can be used as base points in measuring the breadth of the territorial sea of those features.⁷³

The Philippines argues in the Memorial that Johnson Reef, Cuarteron Reef and Fiery Cross Reef are partially above water at high tide. Like Scarborough Shoal, these three features are small, barren protrusions barely rising above sea level that have no fresh water, no food or the capacity to grow it, no vegetation and no living space to support human habitation. They are also incapable of sustaining an economic life of their own. Thus, the Philippines’ claims that Johnson Reef, Cuarteron Reef and Fiery Cross Reef are also “rocks” within the meaning of Article 121(3) of the Convention and therefore are not capable to generate an EEZ or a continental shelf.⁷⁴

71 Memorial of the Philippines, pp. 117 & 131.

72 Memorial of the Philippines, pp. 132~140.

73 Memorial of the Philippines, p. 140.

74 Memorial of the Philippines, pp. 140~142.

In the Memorial, the Philippines states that it is also the positions of Vietnam and Malaysia that none of the 11 features in the southern sector of the SCS are entitled to an EEZ or a continental shelf. Only China claims that the Spratly Islands generate entitlement to a 200 nm EEZ and continental shelf.⁷⁵

The Philippines' claims with regard to the legal nature and rights of the 12 features located in the northern and southern sectors of the SCS raise an important question that is closely related to the Tribunal's jurisdiction over the case and admissibility of the claims made by the Philippines. In particular, it raises the question whether or not the Philippines' claims are well founded in fact and law.

VII. Applicable Law, Specifically UNCLOS

The Philippines' arguments with regard to legal status and rights of the features specified in its Memorial should be examined in accordance with the relevant provisions contained in the UNCLOS, in particular, Article 13 (LTEs), Article 60 (Artificial islands, installations and structures in the exclusive economic zone), and Article 121 (Regime of islands). In addition, other relevant provisions of the Convention include: Article 56 (Rights, jurisdiction and duties of the coastal State in the exclusive economic zone), Article 74 (Delimitation of the exclusive economic zone between States with opposite or adjacent coasts), Article 77 (Rights of the coastal State over the continental shelf), and Article 83 (Delimitation of the continental shelf between States with opposite or adjacent coasts). The interpretation and application of these provisions should be based on the geographical facts of the features as described previously.

If the six protruding features of Scarborough Shoal, as argued by the Philippines, are "rocks" within the meaning of Article 121(3) of UNCLOS because they "cannot sustain human habitation or economic life of their own", these features and Scarborough Shoal as a whole "shall have no exclusive economic zone or continental shelf."⁷⁶ If this claim is established, Scarborough Shoal can have a 12 nm territorial sea in accordance with Paragraph 2 of Article 121. Due to the fact that Scarborough Shoal is located within the EEZ that is established by the Philippines in accordance with Article 47 (Archipelagic baselines), Article 55 (Specific legal regime of the exclusive economic zone) and Article 56 (Rights, jurisdiction and

⁷⁵ Memorial of the Philippines, p. 150.

⁷⁶ Memorial of the Philippines, p. 159.

duties of the coastal State in the exclusive economic zone), fishermen from the Philippines are allowed to fish in the water beyond 12 nm territorial sea that is measured from the baseline of Scarborough Shoal. However, as explained in Part VIII, this claim has both factual and legal problems.

If Second Thomas Shoal, Mischief Reef, and Subi Reef, as the Philippines argues, are LTEs and they are situated at a distance exceeding the breadth of the territorial sea that is measured from baseline of any land features in the Spratly archipelago, in accordance with Article 13 of UNCLOS, they should have no territorial sea of their own. Certainly they cannot generate an EEZ and a continental shelf. In addition, as argued by the Philippines, these features are not capable of appropriation by occupation or otherwise.⁷⁷ However, Article 60(1) of the Convention provides that in its EEZ, the coastal State “shall have the exclusive right to construct and to authorize and regulate the construction, operation and use of: (a) artificial islands; (b) installations and structures for the purposes provided for in Article 56 and other economic purposes; (c) installations and structures which may interfere with the exercise of the rights of the coastal State in the zone.” In addition, under Article 60(2), the coastal State “shall have exclusive jurisdiction over such artificial islands, installations and structures, including jurisdiction with regard to customs, fiscal, health, safety and immigration laws and regulations.” If Second Thomas Shoal, Mischief Reef, and Subi Reef are located within the EEZ claimed legally under UNCLOS by China Mainland or China Taiwan, the construction, operation and use of artificial islands, installations and structures for the purposes provided for in Article 56 of the Convention and other economic purposes are allowed. This is also applicable to McKennan Reef, Gaven Reef, Johnson Reef, Cuarteron Reef and Fiery Cross Reef.

The interpretation or application of Articles 56, 57 and 60 of the UNCLOS to the nine features, namely Scarborough Shoal, Second Thomas Shoal, Mischief Reef, Subi Reef, McKennan Reef, Gaven Reef, Johnson Reef, Cuarteron Reef and Fiery Cross Reef, are closely related to the interpretation or application of Article 121 of the Convention to Itu Aba Island, Thitu Island, and West York Islands, the three largest land features in the Spratly archipelago. If these three features, as argued by the Philippines, “cannot sustain human habitation or economic life of their own”, in accordance with Article 121(3), they cannot generate an EEZ or continental shelf, which, as a result, gives rise to the questions concerning legality

77 Memorial of the Philippines, p. 159.

of China's appropriation and occupation of the nine features that are specified in the Philippines' Memorial, and construction/operation/use of installations and structures on these features. If it can be established that these three features can sustain human habitation or have economic life of their own, the Philippines' claims with regard to these features should be rejected.

Although the legal status of the three land features, namely, Itu Aba Island, Thitu Island, and West York Island, is the key for the Tribunal to consider if Chinese actions and activities that are conducted on the nine features and/or in the maritime zones that are allowed to generate, in particular with regard to a 200 nm EEZ, in accordance with relevant provisions of UNCLOS, the Philippines does not ask the Tribunal to consider the legal status and rights of these three land features in its submissions. However, it is unlikely that the Tribunal will not touch upon this issue.

VIII. Arguments against the Philippines' Claims

The claims made by the Philippines both in its Statement of Claim and the Memorial, with regard to the nine features – namely Scarborough Shoal, Second Thomas Shoal, Mischief Reef, Subi Reef, McKennan Reef, Gaven Reef, Johnson Reef, Cuarteron Reef and Fiery Cross Reef – are not well founded in fact and law.

The Philippines requests the Tribunal to adjudge and declare in Submission No. 3 of the Memorial that Scarborough Shoal is a "rock" that generates neither an EEZ nor a continental shelf.⁷⁸ However, it is suggested that Scarborough Shoal "... has attracted fishermen for many years and it is reasonable to assume that the rocks and the drying reefs can sustain economic life of their own in the context of Article 121(3) of LOS Convention."⁷⁹ Indeed fishing is the main economic activity in the lagoon of Scarborough Shoal and its surrounding waters. Although it is difficult to establish that the six protruding features can sustain human habitation, they do have an economic life of their own. It should be noted that there are two requirements mentioned in Article 121(3), namely (a) sustain human habitation and (b) sustain economic life of its own, for a feature that is above water at high tide not be treated

⁷⁸ Memorial of the Philippines, p. 271.

⁷⁹ Clive Schofield, *Maritime Boundary Delimitation in East Asian Seas: Overcoming an Obstacle to Cooperation*, paper presented at CSCAP Maritime Cooperation Working Group Meeting, Hanoi, 26-27 May 2014, p. 24.

as a “rock” and therefore is capable to generate an EEZ and a continental shelf. Since Scarborough Shoal has an economic life of its own, it can be established that it is an Article 121(2) island and therefore is entitled the right to generate an EEZ or a continental shelf.

The Philippines requests the Tribunal to adjudge and declare in Submission No. 4 that Mischief Reef, Second Thomas Shoal and Subi Reef are LTEs that do not generate entitlement to a territorial sea, EEZ or continental shelf, and are not features that are capable of appropriation by occupation or otherwise.⁸⁰ However, it should be pointed out that no baselines have been announced by China in the Spratly Islands in accordance with its 1992 Territorial Sea Law and UNCLOS. In addition, although China claims in its Note Verbale sent to the UN Secretary-General on April 14, 2011 that under the relevant provisions of the UNCLOS, as well as its 1992 Territorial Sea Law and the 1998 EEZ and Continental Shelf Law, China’s Spratly archipelago, considered a group of islands in the SCS, is fully entitled to territorial sea, EEZ and continental shelf, it is yet to be determined which features are entitled to a 12 nm territorial sea, 200 nm EEZ, and 200 nm continental shelf. Accordingly, the Philippines’ claims with regard to maritime zones generated from Mischief Reef, Second Thomas Shoal and Subi Reef are not well founded in fact and law.

The Philippines’ claim that Mischief Reef, Second Thomas Shoal and Subi Reef are not features that are capable of appropriation by occupation should also be rejected because these features are located within the EEZ and continental shelf that are generated under Article 56 of UNLCOS for Itu Aba Island, Thitu Island, or West York Island which are claimed by China as its territory. Due to the fact that Itu Aba is an island within the meaning of Article 121(2) of UCNLOS, and that Mischief Reef is located 74.7 nm from Itu Aba Island, and the distance between Subi Reef and Itu Aba Island is 36.7 nm,⁸¹ China is entitled not only the right of appropriation by occupation, but also the exclusive right to construct and to authorize and regulate the construction, operation and use of artificial islands, installations and structures under Article 60 of the Convention for the purposes provided for in Article 56 and other economic purposes in the EEZ of Itu Aba Island. On the same ground, the Philippines’ claim made in Submission No. 12

80 Memorial of the Philippines, p. 271.

81 Michael Sheng-Ti Gau, Issues of Jurisdiction in Cases of Default of Appearance, in Stefan Talmon and Jia Bingbing eds., *The South China Sea Arbitration: A Chinese Perspective*, Oxford: Hart Publishing, 2014, pp. 81~106.

should also be rejected. Due to the fact that Mischief Reef is located within the 200 nm EEZ of Itu Aba Island, China's occupation of and construction activities on Mischief Reef are in no violation of the provisions contained in the Convention concerning artificial islands, installations and structures. In addition, China is allowed to appropriate the feature in question. The Philippines' claim made in Submission No. 5 that Mischief Reef and Second Thomas Shoal are part of its EEZ and continental shelf is inadmissible because it gives rise to a dispute over maritime boundary delimitation between China and the Philippines as both Mischief Reef and Second Thomas Shoal are located within the EEZ that is generated from Itu Aba Island.

It is likely that the Philippines' claims made in Submission No. 6 and No. 7 will be accepted by the Tribunal, and that the Tribunal will declare that Gaven Reef and McKennan Reef (including Hughes Reef) are LTEs and therefore cannot generate entitlement to a territorial sea, EEZ or continental shelf. It is also possible that the Tribunal will accept the claim that Johnson Reef, Cuarteron Reef and Fiery Cross Reef generate no entitlement to an EEZ or continental shelf. The Spratly Islands are composed of more than 200 islets, reefs and shoals. However, for the purpose of arbitration, the Philippines only selects a few features occupied by China in order to deconstruct the whole dispute and mislead the Arbitral Tribunal. If the Tribunal neglects the overall situation of the Spratly Islands and makes its decision solely based on these relatively small features included in the Philippines' Memorial, it might arrive at the conclusion that these features do not meet the criteria of Article 121 of the UNCLOS concerning islands. Therefore, the Philippines' claims are not well founded in fact and law, as required by Article 9, Annex VII of the UNCLOS. In fact, the Philippines tries to mislead the Tribunal to get a favorable result by hiding important facts in this case.

Taking note of the declaration made by China on August 25, 2006 under Article 298 of UNCLOS,⁸² the Philippines deliberately evades reference to the disputes over territorial sovereignty and maritime boundary delimitation in its Statement of Claim and the Memorial. These disputes are excluded from the Tribunal's

82 The Government of the People's Republic of China does not accept any of the procedures provided for in Section 2 of Part XV of the Convention with respect to all the categories of disputes referred to in paragraph 1 (a) (b) and (c) of Article 298 of the Convention. For the Declaration, visit the UN website, at http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm, 3 June 2014.

jurisdiction.⁸³ With regard to sovereignty disputes over islands, UNCLOS does not contain any provisions in any of its articles for resolution of these disputes. However, once the ownership of the disputed islands is settled, the States that own the islands are entitled to the right to establish a territorial sea of up to 12 nm measured from the baseline in conformity to the provisions of the Convention. In addition, such States are allowed to claim exclusive sovereign rights and jurisdiction over maritime resources in the area out to 200 nm that is measured seaward from the baseline of a small island, but not from a “rock” as defined by Article 121(3). Similarly, such a State could claim the continental shelf surrounding an island.

It is unlikely that the Tribunal will not to touch upon the legal status and rights of Itu Aba Island, Thitu Island and West York Island when it considers the request made by the Philippines to declare that Mischief Reef, Second Thomas Shoal and Subi Reef are not features capable of appropriation by occupation of otherwise, and that China’s occupation of and construction activities on Mischief Reef: (a) violate the provisions of UNCLOS concerning artificial islands, installations and structures; (b) violate China’s duties to protect and preserve the marine environment under the Convention; and (c) constitute unlawful acts of attempted appropriation in violation of the Convention. As pointed out by Robert Beckman, it is estimated that “less than forty of the features in the Spratly Islands meet UNCLOS’s definition of an island”. This geographical situation raises several questions that are related to the interpretation and application of Article 121 of the Convention. Beckman asks:

*First, how many of the features [in the Spratly Islands] are islands because they are naturally formed areas of land surrounded by and above water at high tide? Second, how many of the islands are entitled only to a territorial sea and contiguous zone because they are rocks that cannot sustain human habitation or economic life of their own? Third, how many of the islands are in principle also entitled to an EEZ and continental shelf because they can sustain human habitation or economic life?*⁸⁴

The Philippines argues that Itu Aba Island, Thitu Island and West York, the

83 The Statement of Claim on West Philippine Sea, para. 7.

84 Robert Beckman, The UN Convention on the Law of the Sea and the Maritime Disputes in the South China Sea, *The American Journal of International Law*, Vol. 107, No. 1, 2013, p. 142.

three largest land features in the Spratly island group, are “rocks” within the meaning of Article 121(3), but this argument is not well founded in fact and law. Although the number of features, that are located in the Spratly archipelago and qualify as islands in accordance with Article 121 of the UNCLOS, varies, Mark J. Valencia, Jon M. Van Dyke, and Noel A. Ludwig suggest that between 25 and 35 of the 80~90 distinct features in the Spratly area are above water at high tide, and therefore they qualify as “islands” under Article 121 of the Convention.⁸⁵

Based on a number of writings on the Spratly Islands, Gregory B. Poling suggests that there are 30 features in the Spratly archipelago that are classified as “islands” which include Cuarteron Reef, Fiery Cross Reef, Gaven Reef, Itu Aba Island, Johnson South Reef, Thitu Island, and West York Island.⁸⁶ Robert Beckman and Clive H. Schofield suggest that because they all have vegetation, and in some cases roads and structures have been built on them, the following features, from largest to smallest in estimated area, are “islands” and therefore entitled in principle to EEZ and continental shelf under UNCLOS: Itu Aba, Thitu Island, West York Island, Northeast Cay, Southwest Cay, Spratly Island, Namyit Island, Nansha(n) Island, Sand Cay, Loaita Island, Sin Cowe Island and Amboyna Cay.⁸⁷ In January 2010, the U.S. government released a *South China Sea Map and Gazetteer*, in which Cuarteron Reef, Fiery Cross Reef, Gaven Reef, and Johnson Reef are specified as geographical features that are visible at high tide. In addition, Itu Aba,

85 Mark J. Valencia, Jon M. Van Dyke and Noel A. Ludwig, *Sharing the Resources of the South China Sea*, Honolulu: University of Hawaii Press, 1999, pp. 41~42.

86 This determination is based on Monique Chemillier-Gendreau, *Sovereignty over the Paracel and Spratly Islands*, The Hague: Kluwer Law International, 2000, pp. 17~18; David Hancox and Victor Prescott, A Geographical Description of the Spratly Islands and an Account of Hydrographic Surveys amongst Those Islands, *IBRU Maritime Briefing*, Vol. 1, No. 6, 1995, pp. 3~30; and Cire Sarr, Digital Gazetteer of the Spratly Islands, August 2011, at <http://www.southchinasea.org/2011/08/19/digital-gazetteer-of-the-spratly-islands/>, 31 May 2014. See Gregory B. Poling, The South China Sea in Focus: Clarifying the Limits of Maritime Disputes, A report of the CSIS Sumitro Chair for Southeast Asia Studies, Center for Strategic & International Studies, July 2013, at http://csis.org/files/publication/130717_Poling_SouthChinaSea_Web.pdf, 31 May 2014.

87 Robert C. Beckman and Clive H. Schofield, The South China Sea Disputes: Formula for a Paradigm Shift?, *RSIS Commentaries*, 19 February 2014, pp. 1~2, at <http://www.eurasiareview.com/19022014-south-china-sea-disputes-formula-paradigm-shift-analysis/>, 31 May 2014. Also based on the information given by Professor Beckman on February 19, 2014 to this writer via e-mail.

Sin Cowe, Thitu, and West York are labeled as “Island” in the Map.⁸⁸

IX. Concluding Remarks

Based on geographical facts, the three largest features in the Spratly archipelago, namely, Itu Aba, Thitu, and West York, should each be treated as an “island” in accordance with Article 121. Under paragraph 2 of the same article, they are entitled not only a 12 nm territorial sea, but also a 200 nm EEZ and continental shelf. The Philippines’ arguments that these land features are “rocks” and therefore are not entitle the right to generate EEZs or continental shelves are “not well founded in fact and law”. The ownership of the three islands is disputed by Chinese Mainland and Taiwan, the Philippines and Vietnam. At present, Itu Aba is under Taiwan’s effective control, but Thitu Island and West York Island are occupied by the Philippines. It is clear that China claims ownership of these three land features. According to the Note Verbale sent by China to the UN Secretary-General on April 14, 2011, China claims that under the UNCLOS, the 1992 PRC Territorial Sea Law, the 1998 PRC EEZ and Continental Shelf Law, the Spratly Islands “is fully entitled to” territorial sea, EEZ and continental shelf. In addition, in the same Note Verbale, China accuses the Philippines of invading and occupying some islands and reefs of the Spratly Islands in 1971, including Thitu Island and West York Island. Therefore, it is very difficult for the Arbitral Tribunal not to touch upon the issues involving with sovereignty over the disputed island and maritime boundary delimitation. China opted out the Tribunal’s jurisdiction by making a declaration in August 2006 in accordance with Article 298 and Article 310.

As the above features, treated as LTEs in the Philippines’ Memorial, and located within the 200 nm EEZ and continental shelf of the three largest islands in the Spratly archipelago, Article 60 should be applied. Under this provision, it is legal for China to build artificial islands, construct installations and structures within the zone. The Philippines is entitled to claim a 200 nm EEZ and continental shelf drawn from its archipelagic straight baselines, but the disputed and overlapping maritime zones generated by the islands in the Spratly

88 South China Sea, Map and Gazetteer, US Government, 803425AI (G02257) 1-10, January 2010. The map and gazetteer are available online at the website of the Centre for International Law, National University of Singapore, at http://cil.nus.edu.sg/wp/wp-content/uploads/2011/06/75967_South-China-Sea-1.pdf and http://cil.nus.edu.sg/wp/wp-content/uploads/2011/06/75967_gazetteer.pdf, 2 June 2014.

archipelago should be excluded from the Arbitral Tribunal's jurisdiction because of China's 2006 declaration. In addition, because China's activities are conducted in accordance with the relevant provisions contained in UNCLOS, in particular Articles 56, 60 and 121, the Philippines' claims in relation to the legal status and right of, as well as Chinese occupation of and construction activities on the features, namely, Mischief Reef, Second Thomas Shoal, Subi Reef, Gaven Reef, Kennan Reef, Johnson Reef, Cuarteron Reef, and Fiery Cross Reef, are ill-founded and inconsistent with the applicable law. Accordingly, it would be difficult for the Arbitral Tribunal to rule in the Philippines' favor on claims related to the LTEs, islands, and rocks in its Memorial.